

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TED SOUZA, et al.,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

No. C 13-4407 PJH

**ORDER GRANTING MOTION
TO DISMISS**

The motion of defendants California Department of Transportation and Malcolm Dougherty (collectively, "CalTrans") for an order dismissing the second and seventh causes of action came on for hearing before this court on January 29, 2014. Plaintiffs appeared by their counsel Stuart Gross, and CalTrans appeared by its counsel Derek Van Hoften. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motion as follows.

BACKGROUND

This is a case brought under the Administrative Procedures Act, 5 U.S.C. § 701, et seq. ("APA"), challenging a proposal by CalTrans to widen and/or otherwise modify portions of U.S. Route 199 ("U.S. 199") and State Road 197, in an area bordering the Smith River and generally within the Smith River National Recreation Area.

Defendants are CalTrans; Malcolm Dougherty, the Director of CalTrans (in his official capacity); the National Marine Fisheries Service ("NMFS") – a division of the National Oceanic and Atmospheric Administration ("NOAA") and the United States Department of Commerce; and Samuel D. Rauch III, Acting Assistant Administrator for

1 Fisheries for NOAA (in his official capacity).

2 The Smith River, which is located in Del Norte County, is the last remaining
3 undammed river in California. Approximately 300 miles of the river are designated "wild
4 and scenic" under the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, et seq. The Smith
5 River has also been designated "critical habitat" under the Endangered Species Act
6 ("ESA"), 16 U.S.C. § 1531, et seq., for the Southern Oregon Northern California Coast
7 Evolutionary Significant Unit of coho salmon ("SONCC coho"), listed as a threatened
8 species under the ESA; and designated essential fish habitat ("EFH") for both coho and
9 Chinook salmon under the MSA.

10 Plaintiffs allege that CalTrans seeks to create a network of roads through coastal
11 Northwestern California, along which large trucks would be given unrestricted access along
12 rural roads from Oregon to the San Francisco Bay. Specifically, for purposes of the
13 present action, what CalTrans has designated the "197/199 Safe STAA Access Project"
14 ("197/199 Project" or "Project") calls for major roadwork at seven locations along U.S. 199
15 and SR 197. The five U.S. 199 locations are within the narrow and windy Smith River
16 Canyon, right above the Smith River. The two SR 197 locations are on the Smith River's
17 bank, as the river leaves the mountains and expands into its estuary, which is the spawning
18 ground of the Smith River's population of SONCC coho.

19 The regulatory process employed by CalTrans and NMFS to assess the proposed
20 Project and its potential impacts on the Smith River's salmon populations and their habitat
21 is the consultation process established under the ESA and the Magnuson-Stevens Fishery
22 Conservation and Management Act, 16 U.S.C. § 1801, et seq. ("MSA").

23 Section 7 of the ESA, 16 U.S.C. § 1536, and § 305 of the MSA, 16 U.S.C. § 1855,
24 establish a process through which an agency planning to engage in an action (referred to
25 as the "action agency") that could impact, in the case of the ESA, listed species and their
26 designated critical habitat, or, in the case of the MSA, designated EFH, is required to
27 consult with NMFS (referred to as the "consulting agency") concerning such impacts.

28 In the case of the MSA, § 305(b)(2) and its enabling regulations require action

1 agencies to consult with the NMFS “with respect to any action authorized, funded, or
2 undertaken, or proposed to be authorized, funded, or undertaken, by such agency that may
3 adversely affect any essential fish habitat.” 5 U.S.C. § 1855(b)(2); 50 C.F.R.
4 § 600.920.

5 This consultation is initiated by preparation by the action agency of an EFH
6 assessment which must contain "(i) A description of the action. (ii) An analysis of the
7 potential adverse effects of the action on EFH and the managed species. (iii) The Federal
8 agency’s conclusions regarding the effects of the action on EFH. (iv) Proposed mitigation, if
9 applicable." 50 C.F.R. § 600.920(e)(3). An action agency can limit its EFH assessment to
10 these minimum requirements and thus engage in what are known as the “abbreviated
11 consultation procedures” with NMFS, but only if its action does not have the potential to
12 cause a substantial adverse effect on EFH. 50 C.F.R. § 600.920(h).

13 However, if the action does have the potential to cause a substantial adverse effect
14 on EFH, the action agency must engage in what is known as “expanded consultation
15 procedures” with NMFS, which are intended to “allow[] maximum opportunity for NMFS and
16 the [action] agency to work together to review the action’s impacts on EFH and to develop
17 EFH Conservation Recommendations.” 50 C.F.R. § 600.920(i). These procedures involve
18 (i) an on-site inspection to evaluate the habitat and the site-specific effects of the project;
19 (ii) the views of recognized experts on the habitat or species that may be affected; (iii) a
20 review of pertinent literature and related information; (iv) an analysis of alternatives to the
21 action, including alternatives that could avoid or minimize adverse effects on EFH; and
22 (v) analysis of other relevant information. See 50 C.F.R. § 600.920(e)(4).

23 If the action agency believes that its action would not result in substantial adverse
24 impacts to EFH it may submit an EFH assessment meeting the minimal requirements
25 discussed above. 50 C.F.R. § 600.920(h)(2). However, if NMFS determines that, in fact,
26 “the action may result in substantial adverse effects on EFH, or that additional analysis is
27 needed to assess the effects of the action,” NMFS must request that the action agency
28 engage in expanded consultation. 50 C.F.R. § 600.920(h)(3).

CalTrans and the Federal Highway Administration ("FHWA") executed a Memorandum of Understanding ("CalTrans/FHWA MOU"), under which the FHWA assigned to CalTrans, and CalTrans accepted, the delegation of authority pursuant to 23 U.S.C. § 327, to provide environmental review, consultation, or other such action pertaining to the review or approval of the Project, as required by federal laws including the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq.; § 7 of the ESA, 16 U.S.C. § 1536; § 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303; § 7 of the Wild and Scenic Rivers Act, 16 U.S.C. § 1278; and the implementing regulations of those statutes.

Plaintiffs assert that it was pursuant to the CalTrans/FHWA MOU that CalTrans prepared and adopted an environmental assessment ("EA"¹), based on which it adopted a "finding of no significant impact" (or "FONSI") (collectively with the EA prepared regarding the 197/199 Project, referred to as "the EA/FONSI"), as well as the Revised Biological Assessment for Impacts to Coho Salmon, Designated Critical Habitat, and Essential Fish Habitat Assessment ("EFHA") for the 197/199 Project (the "Revised Coho BA/EFHA") under the ESA and the MSA.

Plaintiffs contend that CalTrans issued the Revised Coho BA/EFHA on March 29, 2012; that CalTrans approved the 197/199 Project and adopted a final EA/FONSI on April 10, 2013; that on April 24, 2013, the FHWA, on behalf of CalTrans, issued a Notice of Final Federal Agency Actions in the Federal Register, giving notice of its decisions; and that CalTrans issued a Project Report on June 6, 2013, purporting to be a Project Approval.

Plaintiffs assert that when CalTrans approved the Project on April 10, 2013, it did not first complete an environmental impact statement ("EIS") as required by NEPA, but rather only the EA/FONSI, which plaintiffs claim was inadequate. Plaintiffs also allege that

¹ An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement [EIS] or a finding of no significant impact [FONSI]." 40 C.F.R. § 1508.9. It must include a "brief discussion" of "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b).

CalTrans' analysis of the Project's anticipated impact on the Smith River's SONCC coho, their critical habitat, and the EFH of coho and Chinook salmon ("Pacific Salmon EFH"), memorialized in the Revised Coho BA/EFHA was inadequate, in part because of CalTrans' failure to look at the anticipated impact of the Project as a whole, instead of on a location-by-location basis.

Plaintiffs contend that the "final actions" referred to in the FHWA's April 24, 2013 Notice of Final Agency Actions included, as to CalTrans, the issuance of the EA/FONSI, and the approval and authorization of the proposed Project based thereon, and as to NMFS, the issuance of the "letter of concurrence" concerning the Project's effects on listed SONCC coho, green sturgeon, and designated SONCC critical habitat, on May 7, 2012.

Plaintiffs filed the complaint in the present action on September 23, 2013, asserting seven causes of action, all under the APA – (1) failure to adequately engage in ESA consultation (against NMFS); (2) failure to adequately engage in consultation under § 305 of the MSA (against all defendants); (3) failure to adequately engage in Wild and Scenic Rivers Act consultation (against CalTrans); (4) failure to prepare an EIS as required by NEPA (against CalTrans); (5) failure to prepare an adequate EA as required by NEPA (against CalTrans); (6) failure to comply with the Department of Transportation Act as required by NEPA (against CalTrans); and (7) failure to comply with NEPA, the ESA, the MSA, the Wild and Scenic Rivers Act, and the Department of Transportation Act (against all defendants).

CalTrans now seeks an order dismissing two claims asserted against it – the second cause of action, for lack of subject matter jurisdiction, and the seventh cause of action, for failure to state a claim.

DISCUSSION

A. Legal Standards

1. Lack of subject matter jurisdiction

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress

1 pursuant thereto. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).
 2 Thus, federal courts have no power to consider claims for which they lack subject-matter
 3 jurisdiction. See Chen-Cheng Wang ex rel. United States v. FMC Corp., 975 F.2d 1412,
 4 1415 (9th Cir. 1992). The court is under a continuing duty to dismiss an action whenever it
 5 appears that the court lacks jurisdiction. Id.; see also Spencer Enters., Inc. v. United
 6 States, 345 F.3d 683, 687 (9th Cir. 2003); Attorneys Trust v. Videotape Computers Prods.,
 7 Inc., 93 F.3d 593, 594-95 (9th Cir. 1996). The burden of establishing that a cause lies
 8 within this limited jurisdiction rests upon the party asserting jurisdiction. Kokkonen v.
 9 Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994).

10 2. Review under § 704 of the APA

11 Section 704 of the APA provides for judicial review of an “[a]gency action made
 12 reviewable by statute and final agency action for which there is no other adequate remedy
 13 in a court.” 5 U.S.C. § 704. For an agency action to be “final,” two conditions must be
 14 satisfied: “First, the action must mark the consummation of the agency’s decisionmaking
 15 process . . . And second, the action must be one by which rights or obligations have been
 16 determined, or from which legal consequences will flow.” Bennett v. Spear, 520 U.S. 154,
 17 177-78 (1997). “The finality requirement is to be applied in a ‘flexible’ and ‘pragmatic’ way,
 18 and courts are ‘guided by a presumption of reviewability.’” Okinawa Dugong v. Gates, 543
 19 F. Supp. 2d 1082, 1092 (N.D. Cal. 2008) (quoting Abbott Labs v. Gardner, 387 U.S. 136,
 20 149-52 (1967)).

21 The finality requirement of Section 704 is “jurisdictional” in quality. Oregon Nat.
 22 Desert Ass’n v. United States Forest Serv., 465 F.3d 977, 982 (9th Cir. 2006). However,
 23 once such jurisdiction has been established, the scope of the court’s review is not limited to
 24 the final decision that satisfied the jurisdictional prerequisite. Rather, “[a] preliminary,
 25 procedural, or intermediate agency action or ruling not directly reviewable is subject to
 26 review on review of the final agency action.” 5 U.S.C. § 704.

27 This authority is a critical component of the structure for judicial review of agency
 28 actions established by Congress through the APA. Requiring that there be a final agency

1 action before review may be taken, but allowing thereafter review of the other agency
 2 actions that led to that final action achieves a balance, on the one hand, between "the basic
 3 presumption of judicial review to one 'suffering legal wrong because of agency action, or
 4 adversely affected or aggrieved by agency action within the meaning of a relevant statute,'"
 5 see Abbott Labs., 387 U.S. at 140 (quoting 5 U.S.C. § 702), and, on the other hand, the
 6 goal of "avoid[ing] the disruption, delay, and piecemeal review that accompany interference
 7 with pending administrative proceedings," see Public Utility Com'r of Oregon v. Bonneville
 8 Power Admin., 767 F.2d 622, 629 (9th Cir. 1985) (citations omitted).

9 B. CalTrans' Motion

10 CalTrans seeks an order dismissing the second cause of action, which alleges
 11 failure to engage in consultation under § 305 of the MSA, and the seventh cause of action
 12 to the extent it duplicates that claim.² Although CalTrans argues both that the court lacks
 13 subject matter jurisdiction, and that the complaint fails to state a claim, the bulk of its
 14 argument is directed towards subject matter jurisdiction.

15 In the second cause of action, plaintiffs assert that in conducting its consultation with
 16 NMFS under the MSA and the implementing regulations, CalTrans acted in a manner that
 17 was arbitrary, capricious, an abuse of discretion, and/or was otherwise not in compliance
 18 with the law; and that it failed to properly analyze the Project's adverse effects.

19 CalTrans argues that the second cause of action should be dismissed for lack of
 20 subject matter jurisdiction because it is based on the submission of an allegedly inadequate
 21 EFH assessment to the NMFS, which does not qualify as either an "agency action" or a
 22 "final agency action" under the APA.³

24 ² In their opposition to the present motion, plaintiffs describe the seventh cause of
 25 action as it applies to CalTrans as based on the claims asserted in the second through sixth
 26 causes of action under the MSA, the Wild and Scenic Rivers Act, NEPA, and the Department
 of Transportation Act.

27 ³ CalTrans also asserts that the acts it is alleged to have taken do not fall under the
 28 narrow scope of actions under the MSA that are subject to judicial review. However, given the
 finding that the challenged action by CalTrans does not constitute "final agency action," the
 court finds it unnecessary to address CalTrans' second argument.

1 The APA defines "agency action" as including "the whole or part of an agency rule,
2 order, license, sanction, relief or the equivalent or denial thereof, or failure to act." 5 U.S.C.
3 § 551(13); Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 62 (2004); see also
4 Rattlesnake Coalition v. U.S. E.P.A., 509 F.3d 1095, 1103 (9th Cir. 2007). In Norton, the
5 Supreme Court emphasized that all the categories listed in the definition "involve
6 circumscribed, discrete, agency actions." Norton, 542 U.S. at 62.

7 Here, the challenged action is the submission of an EFH assessment to NMFS as
8 part of the consultation process under the MSA. See Cplt ¶¶ 177-178. CalTrans argues
9 that the submission of an EFH assessment is not a rule, order, license, sanction, relief, or
10 the equivalent or denial thereof, and does not fit within the nature of those activities as
11 described by the Supreme Court, as it does not implement or prescribe any law or policy,
12 does not constitute a final disposition, and does not grant permission or any other form of
13 license or authority.

14 CalTrans notes that even the allegations in the complaint assert that following
15 submission of the assessment, NMFS evaluated it and exercised discretion in determining
16 whether the action might result in substantial adverse effects on essential fish habitat,
17 whether additional analysis was required, and whether to require expanded consultation.

18 CalTrans argues further that the submission of an EFH assessment is not a "final
19 agency action" as that term has been defined by the courts. In Bennett v. Spear, the
20 Supreme Court identified two conditions that must be satisfied for an agency action to be
21 "final" – the action must mark the "consummation" of the agency's decisionmaking process,
22 and not be simply tentative or interlocutory in nature; and the action must be one by which
23 "rights or obligations have been determined" or from which "legal consequences will flow."
24 Id., 520 U.S. at 177-78 (final biological opinion issued by Fish & Wildlife Service under ESA
25 was a final agency action reviewable under the APA).

26 Here, CalTrans asserts, neither condition is satisfied. With regard to the first prong,
27 CalTrans argues that the mere submission of a EFH assessment to NMFS as an early part
28 of the consultation process is a preliminary step, and does not mark the consummation of

1 the agency's decisionmaking process with respect to the ultimate action it will take on the
2 project. Instead, CalTrans argues, the consultation process requires ongoing coordination
3 with NMFS, as reflected in the MSA's enabling regulations, 50 C.F.R. § 600.920, et seq.,
4 which contemplate further agency consideration and possible modification of analysis and
5 determinations, and reflect that further revision may be required.

6 With regard to the second prong, CalTrans contends that its actions in submitting the
7 EFH assessment did not "impose an obligation, deny a right, or fix some legal
8 "relationship." See Fairbanks North Star Borough v. U.S. Army Corps of Engineers, 543
9 F.3d 586, 591 (9th Cir. 2008). Thus, because the assessment did not determine plaintiffs'
10 rights or obligations, and because plaintiffs' rights remained unchanged by CalTrans'
11 submission of the EFH assessment, there is no final agency action that can trigger judicial
12 review under the APA.

13 Finally, CalTrans asserts that because the seventh cause of action alleges a claim
14 under the APA for violation of the MSA, based on the same allegations that support the
15 second cause of action, the seventh cause of action (or at least the MSA-related portion)
16 must be dismissed for the reasons as stated above with regard to the second cause of
17 action.

18 In opposition, plaintiffs do not address CalTrans' argument that the submission of
19 the EFH assessment was not an "agency action" under the definition in the APA. They do
20 contend that the issuance of the EA/FONSI and its approval and authorization of the
21 proposed Project – which is what they are challenging here – was a "final agency action."
22 They argue that because the EFH assessment was preliminary to, but was part of, that final
23 action, the court has jurisdiction to evaluate it just as it has jurisdiction to evaluate the
24 actual final agency action.

25 Similarly, plaintiffs argue, CalTrans' EFH assessment was also a "preliminary,
26 procedural and/or intermediate action" in NMFS' May 7, 2012 letter of concurrence,
27 because it was a "preliminary step" in the EFH consultation process which led to the
28 issuance of the letter of concurrence. Thus, plaintiffs assert, it can be considered as part of

1 the review of the "final agency action."

2 Plaintiffs assert that the consultation required by MSA § 305 is initiated by the
3 preparation by the action agency (here, CalTrans) of an EFH assessment, which may or
4 may not require further "expanded consultation procedures." They contend that CalTrans
5 failed to meet its obligations under the MSA consultation process, thereby acting in a
6 manner that was arbitrary, capricious, an abuse of discretion, and/or otherwise not in
7 compliance with the law (including the MSA).

8 Specifically, plaintiffs claim, first, that CalTrans improperly combined its ESA
9 biological assessment with its MSA EFH assessment, with the result that neither standard
10 was satisfied; second, that CalTrans improperly segmented the analysis into distinct
11 sections, looking at the adverse effects of the work called for in each of the seven Project
12 locations, in only the immediate vicinity of each location, rather than fulfilling its obligations
13 under the MSA to analyze the potential adverse effects of the Project in each of these
14 locations and on the Smith River as a whole, including the estuary (where no actual
15 roadwork is planned); and third, that CalTrans' analysis failed to use the best scientific data
16 available concerning the effects of road building and/or road runoff on Salmon EFH or
17 measures that can be taken to minimize or offset such effects.

18 In addition, plaintiffs contend that CalTrans relied heavily on the Revised BA/EFH
19 Assessment as the vehicle by which it assessed the proposed Project's potential impact on
20 the Smith River and its salmon populations, incorporating it by reference in the EA. As a
21 result, plaintiffs contend, CalTrans' failures in this regard afflicted its decision to issue the
22 EA/FONSI and approve and authorize the proposed Project.

23 The court finds that CalTrans' motion must be GRANTED. The submission of the
24 EFH assessment to NMFS was not an "agency action" under the definition of that term in
25 the APA because it was not a "rule, order, license, sanction, relief or the equivalent or
26 denial thereof" – or "designed to implement, interpret, or proscribe law of policy . . . a final
27 disposition . . . a permit or other form of permission . . . [or] a prohibition or taking of other
28 compulsory or restrictive action." 5 U.S.C. § 551; see Norton, 542 U.S. at 62. Thus, it is

1 not subject to judicial review on that basis.

2 Nor was it a "final agency action." The action plaintiffs are challenging as the "final
3 agency action" appears to be the action reflected in the April 24, 2013 "Notice of Final
4 Agency Action" which was published in the Federal Register by the FHWA (part of the
5 Department of Transportation). However, even if the submission of the EFH assessment
6 by CalTrans could be construed as a preliminary agency action reviewable as part of a final
7 agency action, the APA contemplates that the preliminary and final actions be taken by the
8 same agency within the same statutory scheme. 5 U.S.C. § 704.

9 Here, plaintiffs challenge CalTrans' submission of the EFH assessment, and claim
10 that it is reviewable as a preliminary agency action based on NMFS taking a final agency
11 action or CalTrans taking a final agency action under NEPA. The court finds no authority
12 for such a proposition.

13 CONCLUSION

14 In accordance with the foregoing, the court finds that the claims asserted against
15 CalTrans in the second cause of action, and in the seventh cause of action to the extent it
16 is based on the MSA, must be DISMISSED for lack of subject matter jurisdiction.

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18 **IT IS SO ORDERED.**

19 Dated: February 26, 2014



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21 PHYLLIS J. HAMILTON
22 United States District Judge
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